

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action
No.04-10544NMG

Timothy Dykens,
Petitioner,

V.

Peter Allen
Respondent.

ON APPEAL FROM THE JUDGMENT OF THE STATE
COURT PURSUANT TO 28 U.S.C. § 2254.

PETITIONER'S MEMORANDUM

Timothy Dykens
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P.O. Box 100
South Walpole, MA 02071

Dated 2 January 2006

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STATEMENT OF THE CASE

On June 12, 1996, an Essex County Grand Jury returned indictment 9677-CR-1729 charging the defendant with the offense of murder in the first degree in violation of G.L. ch 265 § 6; and indictment 9677-CR-1730 charging the defendant with the offense of attempted aggravated rape in violation of G.L. ch 274, §6; and indictment 9677-CR-1731 charging the defendant with the offense of kidnapping in violation of G.L.ch 265, §26.¹ (A-1,9,17)*

Trial commenced on October 20, 1997 and on October 27, 1997, the jury returned a verdict of guilty on indictment 1729 by reason of deliberately premeditated malice aforethought and extreme atrocity or cruelty and guilty verdicts on each of the other indictments. On the murder indictment, the Court, Grasso, J., imposed a sentence of life and concurrent sentences of 3 to 5 years on the attempted aggravated rape charge and 8 to 10 years on the kidnapping charge. (Tr. XI-176-177) The defendant duly filed a Notice of Appeal. (A-25) On February 26, 1999, the defendant's Motion For New Trial was filed in The SJC.

* Citations to the Appendix will be denoted (A-); citations to the transcript of the trial will be denoted as follows: 10/20/97 (Day 1) Tr.I; 10/21/97: (Day two, Part one), Tr. II; 10/21/97: (Day Two, Part Two) TR. III; 10/21/97: (Daw Two 2:00 pm to 4:00 pm.) Tr. IV; 10/22/97: (Day Three, Part One), Tr. V; 10/22/97 (Day Three Part Two), Tr. VI; 10/22/97: (Day Three, 2:00PM) to 4:00 pm.) Tr.VII, 10/23/97: (Day Four, Part One), Tr. VIII; 10/23/97 (Day Four part two) Tr.IX; 10/23/97: (Day four, 2:00pm to 4:00pm.) TR. X; 10/27/97: (Day Five) Tr. XI

On March 1, 1999, the S.J.C. ordered the Appellate proceedings stayed and remanded the motion for a new trial. On June 2, 1999, The Superior Court Judge Grasso, J., issued a Memorandum of Decision and Order on Defendants Motion for New Trial (A-30) and on July 22, 1999 the defendant filed a Notice of Appeal of the denial of his Motion for a New Trial. (A-36) on June 17, 2002 the defendant filed his Appeal from Judgment of the Superior Court and from the denial of his Motion for New Trial. The Prosecution filed their Rebuttal Breif in November of 2002. The Appeal was argued on January 10, 2003, by Attorney Bernard Grossberg for the defense, and by Attorney Massing for the Commonwealth. It was decided by the S.J.C. on March 14, 2003 that the judgments were affirmed.

STATEMENT OF THE ISSUES

WHETHER THE MASSACHUSETTS APPEALS COURT DECISION WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT WHEN DENYING PETITIONERS ISSUE THAT THE JUDGE COMMITTED CONSTITUTIONAL ERROR BY IMPLEMENTING AN UNPRECEDENTED NOTE-TAKING PROCEDURE FOR ONLY THE LAST PORTION OF THE JURY INSTRUCTIONS.

WHETHER THE MASSACHUSETTS APPEALS DECISION WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT WHEN DENYING PETITIONERS ISSUE THAT THE DEFENDANTS RIGHTS TO A FUNDAMENTALLY FAIR TRIAL AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY COUNSEL'S FAILURE TO OBJECT TO A PREJUDICIAL INSTRUCTION, FAILURE TO PRESENT THE TESTIMONY OF THE DEFENDANT AND OTHERS, AND FAILURE TO MAKE A CLOSING ARGUMENT ON TWO INDICTMENTS, AND CONCEDED THE DEFENDANTS GUILT.

WHETHER THE MASSACHUSETTS APPEALS DECISION WAS CONTRARY TO OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT WHEN DENYING PETITIONERS ISSUE THAT THE JUDGE COMMITTED ERROR BY CLOSING THE COURTROOM DURING JURY INSTRUCTION WITHOUT MAKING FINDINGS

STATEMENT OF THE FACTS

Peabody Police Sergeant Edward Bettencourt testified that on June 2, 1996 at 12:45 am. He went to the Ledgewood Way Condominiums. (Tr. II-48-49) He walked into the adjacent wooded area and at the bottom of an embankment, he observed a partially naked white female with a cloth around her waist, massive head injuries and her genital area and breasts were exposed(Tr.II-55-56,57)

Cheryl Ann Parrott testified that in June of 1996 she had been working as an exotic dancer at the Golden Banana in Peabody (Tr.II-72-73,80) The dancers are paid salary, they retain their tips and are not discouraged from fraternizing with patrons.(Tr.II-80) Parrott worked a double shift on June 1,1996 because Saturday is a busy night.(Tr.II-73-74,83) Sometime after 8:00pm the defendant asked Parrott to have a drink with him and his friend.(Tr.II75-83) who did not try to conceal his identity and introduced himself as "Tim"(Tr.II 75-78) Parrott described the defendant as being very nice, very polite, not rude or crude and was very considerate. (Tr. II-77-79) Parrott observed the defendant drinking alcohol for approximately two and one half hours to three hours. (Tr. II-77-78)

Vicki Clifford who resided at Four Ledgewood Way, testified that after a dinner date on her birthday, she returned home at about 11:00 pm on June 1,1996, undressed took out her contact lenses (she was near sighted) and began reading. (Tr.V-31,33,34) From her

bedroom window, Clifford saw two people struggling against a white station wagon in the visitor parking lot. One person wearing something white(Tr.V-33-36) The two people were struggling for about 30 seconds when they fell to the ground(Tr.V-36-37) After switching windows(Tr. V-36-37) Clifford saw an individual walk across the parking lot and "deliver 4 or 5 very violent kicks to who ever was on the ground" "stood there, turned around and walked away"(Tr.V-38) At that point, Barry Flamm arrived and parked two rows in front of the people on the ground.(Tr. V-39-40) She last saw one of the two people trying to pull themselves up from the ground using the bushes. Flamm exited his car, and Clifford no longer saw any of the people(Tr. V38-41) Clifford returned to bed without calling the police(Tr.V-46)

Barry Flamm, lived at that location and he testified that he and a friend went out and he drove her home before returning to his apartment.(Tr.IV-4-6) As he parked he noticed two people behind his car in the bushes, one a male wearing a white shirt sort of laying on top of another person inside the tree line (Tr.IV 6-9,27-28) On the walkway Flamm noticed items strewn about. Mountain Dew, black High Hell shoes, and other items (Tr.IV-11,26) Flamm picked up the soda and went to his apartment. From his window Flamm noticed a silhouette of a person dragging another person by their arms towards an opening in the bushes down toward the train tracks. (Tr.IV-11-17) Flamm then saw a stocky man about 5' 10"

tall wearing navy blue shorts, black shoes, and a short sleeved golf shirt emerge from the woods (Tr. IV-13-14) The man who emerged from the woods spoke with a woman then moved his car into a visitor parking space. (Tr. IV-15-46) Flamm then called condominium personnel and although he was told to call the police, Flamm did not do so and returned to the window instead. (Tr. IV 17-18) Flamm then saw Steven Bornstein, arrive with a woman (Tr. IV 18-19, 40-43) The same man he had seen earlier emerged from the woods again and spoke briefly to Bornstein (Tr. IV 19, 21, 43) When that man stopped talking to Bornstein he ran to his car, threw something into the car and left (Tr. IV 21-22, 24) Flamm went to talk to Bornstein and noticed that the black high heel shoes were missing. (Tr. IV-28)

Marcia Kalman, Steven Bornstein's mother testified that her son drove her to a party after leaving her car in the visitors parking lot (Tr. IV-47-48) Sometime around 12:30 am when they returned to the Condominiums Kalman heard "a crunching sound coming from the woods" as she was pulling the car into the parking lot. (Tr. IV-49-50, 66-67) After picking up some items from inside her sons apartment, and on the way to her car she noticed groceries, black platform high heel shoes, pink or chartreuse sequined clothing and keys in a planted area near the building (Tr. IV 50-52) Kalman also noticed a stocky young man coming out of the woods walking towards her car, wearing dark shorts, and a light shirt who was

looking on the ground. The man briefly talked to her son. (Tr.IV 52-55,67-68) Kalman Identified John Keegan as the man she Observed that night by a photograph (Tr. IV 68-70)

Doris Waldman, an Assistant Vice President of the Salem Five Cent Savings Bank; Testified that her bank operates an ATM Machine at the Mobil Mart Convenience store on Lowell Street Peabody. (Tr.III 3,4-5) On June 2,1996, The branch manager gave her a surveillance camera and a blow up of sixteen individual photographs with the time and date marked between 12:04 to 12:30 AM (Tr.III 6-7,8-10).

Attorney Glen Yanco, General Manager and in house counsel for Snaxin INC., owner of the Mobil Mart, testified that there were two exterior surveillance cameras and six cameras in the interior of the store. (Tr. III 12-13,14) A video tape was introduced for the time between 12:10 AM and 12:15 Am. On June 2,1996 during which time Eric Swindell was working (Tr.III 18-20) The register tapes showing the victims purchases were also introduced (Tr.III 21-23)

Eric Swindell an employee at the Mobil Mart went outside around midnight for a cigarette. (Tr.III 24-25,26) Two male customers arrive. One wearing khaki colored pants and a dressy sweater. He had brownish/blonde hair which was long and nicely combed. (Tr.III 26) The other man wore blue jeans and a white T-shirt. (Tr.III-27) Swindell described Keegan as being older, heavier

in comparison to the younger and smaller defendant²

A regular customer arrived in a Ford Explorer and Swindell said, "Hi, Mrs. Crowley." (Tr.III 28-30) (Tr.III 46-88) Keegan, who was chewing tobacco from a Skoal can asked Swindell, "Do you know her?" Swindell replied, " She comes in here all the time " (Tr.III 29-30,33,49) Keegan then said " I want a peice of that;" to which Swindell replied "Good luck, she's married." (Tr.III-30) Keegan then "turned" to the defendant and said, " She looks like the girl from the Banana" (Tr.III-30) The the defendant allegedly said " You know what we got to do,you know what we got to do," over and over at least ten times.³ Swindell told Keegan that she was a stripper and then he walked the victim to her car. Keegan, with the defendant as a passenger, eventually drove out of the parking lot following the victim's car. (Tr.III-31-32,33,48,52-53) On videotape Swindell Identified Keegan, the defendant, the victim, and Keegans car at 12:04 Am (Tr.III 38,39,41) Swindell made a statement to a State Police Trooper and to a detective describing the defendant as being "really drunk", and that Keegan seemed more together than the defendant (Tr III 45,46,50-54)

2 In an answer stricken by the court, Swindell characterized Keegan as the leader (Tr.III-46)

3 This statement could not have been made by the defendant as the defendant never spoke to Swindell, or in his presence, and the surveillance tape showed that the defendant was in the car when Keegan and Swindell spoke.

Steven Bornstein, who resided at Four Ledewood Way testified that he went to a party with his mother Marcia Kalman (Tr. V-4,5-6) Sometime after midnight when his mother drove him home to pick up her car, he saw a pair of black high heel shoes, a set of keys, and groceries near a walkway. (Tr.V-6-7,9) After picking up items inside his apartment that were his mothers Bornstein accompanied his mother to her car, they spoke briefly as she was pulling away. He then spoke briefly with a man [later identified as Keegan] after speaking briefly Bornstien turned around to go back into the apartment, the man followed. Bornstien quickly shut the security door and looked back to see the man in the vestibule using the in house phone. (Tr.V-9-14) Bornstein then called the police.(Tr.V-14) After phoning the police he then witnessed the man reach down in the walkway area, then run diagonally across the parking lot and drive off. (Tr.V-13,15-16,21-22) After the man left the black high hell shoes were no longer there. (Tt.V-16)

Angela Malagrifa, testified that in June of 1996 Kristen Crowley was her best friend and she had known her for about 15 years. (Tr.V-46,47) Malagrifa explained that the victim had a second job as an exotic dancer. Malagrifa would accompany her to were she performed to help with the money.On June 1,1996 she accompanied her to a bachelor party. (Tr.v-48-49,52) Crowley was wearing an ankle length black skirt, a green blazer

and her cousins black platform shoes.(Tr.V-49) She wore a pink sequined outfit while she performed; however, she did not wear the outfits panties because they were uncomfortable. The panties were in her hand or vehicle when she left Malagrifa. (Tr.V-52-53)

Joseph Connors, who lives on Goodale Street, testified that the Ledgewood Condominiums are on the other side of Lowell Street and that his home is approximately a $\frac{1}{4}$ of a mile from the Mobil Mart. (Tr.V 54-55,59-60) On June 2,1996, Connors went to a Cul-de-sac about 500 yards from his home were he noticed a shoe on the ground (Tr.V-55-59) The following day after reading about the incident he returned and retrieved the shoe and delivered it to the police. (Tr.V-56-57)

State Police Trooper Walter Hanley, testified that in the early morning hours of June 2,1996, after photographing the scene and taking fingerprints from the victims' Ford Explorer he attempted to lift prints from a can of Beef-A-Roni, a bottle of water, a can of Skoal, a torn plastic bag found in the parking lot, two breath fresheners, two rocks and a in house telephone.(Tr.V 65,66-67-69-74,76-82,85,89) no prints were found on the rocks, Skoal can or the torn plastic bag. (Tr.V 67-77,82-83) The victim's prints were found on her Ford Explorer and the Beef-A-Roni can. (Tr.V-70-71) John Keegans prints were found on the in house phone at the entrance of Four Ledgewood Way. (Tr.V 71 73)

State Police Trooper Gary Mozuch testified he and his partner Xanado, a German Shepard (Tr.VI-3-4-8,9-10) On June 2,1996 shortly before 3:00 AM responded to Four Ledgewood Way straight from home. (Tr.VI-10-12,21) Where they began to search(Tr. VI-11-13) Xando Followed the most recent scent. (Tr. VI-22-23) The tracking proceeded along the railroad tracks, across highway 114 before heading down a steep embankment (Tr. VI-13-15) Xando tracked to an area near a Sunoco gas station to a telephone booth and remained at that location. (Tr.VI-15-17,17-21,23)

Danvers Police Officer Brian Casparian Testified that on the morning of June 2,1996 he was patrolling highway 114 where it intersected with Garden Street and the railroad tracks. (Tr.VI-31-32,33) At approximately 2:40 AM on route 114 near the Sunoco gas station, he noticed the defendant shirtless and talking on a telephone booth (Tr. VI-34-35) He noticed that the man had scratches on his back, his jeans were wet, and he had a wet shirt in his hand. (Tr.VI-35,40-41)

State Police Forensic Chemist Debra McKillop-Shields, testified that there was no sperm or any forensic evidence of rape from the swabs and slides taken from the victims vaginal, rectal and oral cavities (Tr.VII-3-4,65-66) Red brown stains areas on the defendants jeans, underwear and white sweatshirt were sent to the F.B.I. Laboratory (Tr.VII-57-59) rape kit and penile

swabs from the defendant tested negative for blood (Tr.VI65) And no forensic evidence of sexual assault was introduced.

Deborah Hobson, A forensic examiner in the DNA unit of the FBI. Laboratory testified that out of the five samples taken from the defendant's jeans, underpants and shirt, only the stain on the underpants matched the victims' DNA. (Tr.VIII-47,53,55)

Associate Chief Medical Examiner Gerald Feigin Testified that there was no indication of a sexual assault and no trauma to the victims external genitalia or interior vagina, in which he found a tampon during her autopsy. (Tr.IX-3-4,19-20) Death resulted from a number of blunt trauma blows to the head (Tr.IX-39-41)

Peabody Police Sergeant Robert Conway, testified that on June 2,1996, as a shift supervisor, at 3:00AM he came into contact with the defendant at the police station. (Tr.IX-51-52) The defendant had a strong odor of alcohol and was very unsteady on his feet and after SGT.Conway made a determination that he was intoxicated, he was placed in Protective Custody for his own safety.(Tr.IX-52-54)

State Police Sergeant John Garvin testified that at 3:30 AM he learned of Keegans name and address (Tr.IX57-58,61-64) Officer Garvin did not find Keegan at his fathers home when he searched his residence. (Tr.IX-70-73,78-79) At approximately 5:00PM, Keegan

surrendered through his attorney and during his booking procedure, a can of Skoal was seized. (Tr.IX-74-79). After the attorney provided the keys to Keegans car, two additional cans of chewing tobacco were seized. (Tr.VII-83) Neither the clothing that Keegan wore when he surrendered.(Tr.IX-74-79), nor the clothing that subsequent counsel gave to the police claiming they were what Keegan wore on June 2,1996, matched the clothing he wore in the Mobil Mart videotape. (Tr.IX-87-91,66-67)

ARGUMENT

WHETHER THE MASSACHUSETTS APPEALS COURT DECISION WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT WHEN DENYING PETITIONERS ISSUE THAT THE JUDGE COMMITTED CONSTITUTIONAL ERROR BY IMPLEMENTING AN UNPRECEDENTED NOTE-TAKING PROCEDURE FOR ONLY THE LAST PORTION OF THE JURY INSTRUCTIONS.

In this first degree murder trial, the trial judge committed constitutional error and a fundamental miscarriage of justice requiring the defendant be afforded a new trial, and the judge abused his discretion by implementing an unannounced, unrestricted and unbalanced note-taking procedure after closing argument for only the last two-thirds of his instructions to the jury. Moreover, the jurors' respective notes were taken into deliberations without appropriate instructions. Indeed, without instructions of any nature at all. There was no strategic or other reason for trial counsels'

failure to object to this procedure or for his failure to request cautionary instructions, or for his failure to request to inspect the juror's notes for accuracy or other errors. This procedure violated the defendants' rights to be present at the critical stage of his trial when the jurors notes were re-read to the other deliberating jurors; right to the effective assistance of counsel; right to a fundamentally fair trial; and right to due process and equal protection of the law guaranteed him by Articles I, X, XI, XII and XXIX of the Massachusetts Declaration of Rights, as well as, ~~by~~ the Sixth and Fourteenth Amendments to the Constitution of the United States.

(A) The Arbitrary, Unrestricted And Unbalanced Note-taking Procedure.

The trial judge did not give the jury instructions regarding note-taking during his preliminary instructions to the jury. (Tr. I-10-13, 15-17, 21, 23-27, 39-40) Nor, did the trial judge give the jury such instructions during the course of the trial (Tr. II, III, IV, V, VI, VII, VIII, IX, X) or during final instructions. (Tr. XI-36-155) Trial counsel was not forewarned during the trial of the judge's intention to permit note-taking, nor did the trial judge disclose his intention during the charging conference (Tr. -6-10) or prior to closing argument. At the outset of the trial, contrary to his final instructions, the trial judge explicitly informed the jury that note-taking would not be allowed. (Tr. II-18-20) After closing argument, the trial judge

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sua sponte, implemented the following note-taking procedure:

THE COURT: Now, ladies and gentlemen, I want to tell you how my charge is going to be organized. **I am going to break it into two parts:** The first part deals with matters of general applicability which apply to most, if not all, criminal cases. **And the second part of the charge will deal with the substantive law of the indictments** which have been tried before you.

I want you to understand that, sometimes, jurors ask me -- **as to the first part, you are going to be relying entirely on your memory. You will not have the benefit of any notes.** Prior to beginning the **substantive law** which relates to the indictments that have been tried here, I will have you stand, take a little stretch break, **and I will have the court officers distribute notebooks to you.** And you will be able to take notes as to the **substantive law** that applies to each of these indictments. Because the law is not always easily explained, not just to jurors, but also to attorneys and judges, I am going to allow you to use these notebooks **when and as you believe it would be helpful in making a notation reflecting what the status of the law is.**

You will not need to take down everything or even close to everything that I say, at that point in time.

Also, **you will not have a written transcript of these instructions with you,** when you are in the jury room. So, **use these notebooks in the manner you consider helpful.** But, above all, listen carefully to all of my instructions, both the part where you will not have the ability to take note, and the part where you will have the ability to take notes.

Don't be concerned with writing down what I say so much as in listening to what I tell you about the law.

(Tr.XI-36-37) (emphasis added)

Immediately after instructing the jury on the province of the jury(Tr.XI-39), impartiality (Tr.XI-

-13-

39-40), inferences (Tr.IX-40-41) types of evidence (Tr.XI-41-56) argument by counsel (Tr.XI-47-48), consciousness of guilt (Tr.XI-56-57), voluntariness of the defendants statements (Tr.XI-57-58), credibility of witnesses (Tr.XI-60-64), prior inconsistent statements (Tr.XI-65), the presumption of innocence (Tr.XI-66-67) and the Commonwealth's burden of proof beyond a reasonable doubt (Tr.XI-70), the trial judge informed the jury that:

Now ladies and gentlemen, that concludes the first part of my charge. And as I promised you, at this point, I am going to let you stand and let you take a brief stretch break. I just ask you not to speak with each other. I will have the court officer pass out to you notebooks and pencils on which **you may, if you wish, make notes of the substantive law**, of the particular indictments. And again I tell you, when I am instructing you on the **substantive law**, the important thing is to listen attentively to what I am saying. **You do not need to take down all or even a major portion of what I'm saying. But, to the extent that you wish to do so, you may make a note or two to assist you.**

I am also going to have the court officer pass out to you copies of the verdict slips, which the foreperson will have in the jury room -- the original of which the foreperson will have in the jury room. And at the appropriate time in my instructions, I am going to direct you to the particular verdict slip for each particular indictment. I hope that it will assist you in understanding that law.

You may stand now and take a break.

...

THE COURT: The copies of the verdict slips, I ask you not to begin reading them, but to turn them over, face down; at the appropriate point in the charge, I will tell you to turn them over and look at them.

Before we begin, **we will make sure that every juror has a notebook and something to write with.** Is there any juror that does not have a notebook or something to write with?

Okay, I want to turn to the substantive law
of each of the indictments.

(Tr. XI-70-71) (emphasis added)

The instructions to the jury total 118 pages in length, (Tr.XI-35-153) Although the trial judge did not allow notes to be taken on the first 34 pages of his instructions (Tr.XI-35-69), He allowed and made provisions for notes to be taken during the next 81 pages as to the " **substantive law**". (Tr.XI-72-153) Moreover, the trial judge permitted the jurors unrestricted re-reading of the notes of their respective versions and/or translations of the court's instructions during the jury's deliberations by instructing the jury that, "**you may retain your notebooks...** In the jury deliberations room..."(Tr.XI-153) (emphasis added)

During the entire portion of the jury instructions on which the jurors were allowed to take notes and furnished the means to do so, neither of the fundamental principles of law, such as presumption of innocence, were repeated by the trial judge. (Tr.XI-38-69) In addition, trial counsel failed to make a contemporaneous objection to the trial judge's surprise announcement to implement note-taking, nor did he voice objection to this procedure when invited to do so at the conclusion of the charge, nor did he request cautionary instructions guidelines as required by Rule 8A of the Superior Court Rules. (Tr.XI-153-154)

In contrast to not allowing and not affording

the jury the opportunity to take note during the initial portion of the jury instructions and in particular as to the fundamental principals of law favorable to the defendant and on which he relied on in closing argument, during the portion of his instructions on which the jurors were allowed to take notes, the trial judge continuously, repeatedly and blatantly over-emphasized the Commonwealth's theories as to the defendant's guilt. Using twenty references to phrases such as, "I repeat," "again", "I'll repeat that", "now again," "remember," "I remind you," "I again tell you" "and once again", (Tr.XI-73, 75,76,77,80,89,99,103,104,105,147,148,149), The principle of joint venture was stated by the trial judge no less than four distinct times (Tr.XI-73-84,88-90, 103-104,147-149). The trial judge repeated the elements of aggravated rape eight times (Tr.XI-93,94,95,96,99, 100,102) and in regard thereto, repeated the two theories of guilt on either liability as a principal or a joint venturer, six times. (Tr.XI-73-75,92,102, 103-104,107) Apparently, to afford the jurors sufficient time to record the **"substantive law"** in their notes, the trial judge used the phrases, "let me repeat that," and "the same law," while re quoting the language of G.L. ch.265,§1, four times (Tr.XI-109,110,140): twice with the felony murder (Tr.IX-140) and twice with the respect of deliberately premeditated and cruel or atrocious murder. (Tr.IX-109-110) Utilizing

the phrase, " Let me repeat these for you," the trial judge stated the elements of felony murder five distinct times (Tr.IX-141-142,143,145,146) Utilizing the phrase, "let me repeat those," the trial judge stated the elements of cruel and atrocious murder four distinct times (Tr. IX-120-121,127); and utilizing the phrase, "to summarize," the trial judge stated the elements of deliberately premeditated murder three distinct times. (Tr.IX-110-113,114-116,118).

In contrast to his over-emphasizing the Commonwealth's theories of guilt, the trial judge gave the jury only one brief instruction regarding insufficient proof requiring a verdict of not guilty on the theory of deliberately premeditated murder (Tr. IX-119); only one brief instruction on insufficient proof requiring a verdict of not guilty on the charge of attempted aggravated rape (Tr.XI-107); only one circuitous instruction that the Commonwealth's failure to prove any one of the elements would require a finding that the Commonwealth failed to prove the offense of first degree murder under the theory of extreme atrocity or cruelty (Tr.IX-128-129); and only one brief instruction regarding insufficient proof requiring a verdict of not guilty on the theory of felony murder (Tr.IX-149)

- (b) **The Arbitrary And Unequally Applied Note-taking Procedure Differs Materially From The Standard Note-taking Procedure Governed By Superior Court Rule 8A**

Note taking by jurors during the presentation of evidence has long history of approval in this Commonwealth, H.B. Zobel, The Boston Massacre, p. 271(1970); The Adams Papers: Legal Papers of John Adams, vol. 3, p.25, N.89(1965) Commonwealth v. Tucker, 189 Mass. 457,497(1905); Commonwealth v. Wilborne, 382 Mass. 241,253(1981), and in other jurisdictions. Taking And Use Of Trial Notes By Jury, 36 ALR 5th 255-375. Note-taking during jury instructions appears to have begun in this Commonwealth after Superior Court Rule 8A went into effect on May 6,1978. Commonwealth v. St. Germain, 381 Mass. 256,265-270, N.15(1980)

A Trial judge's discretionary authority to allow note taking is not without limit as Superior Court Rule 8A mandates that, "...the trial judge **shall** precede the announcement of permission to take notes with appropriate guidelines," Id (emphasis added) Rule 8A's requirements have been cited with approval for appropriate cautionary instructions when note-taking is allowed during jury instructions. Commonwealth v. St. Germain, Id. at 266. Under Rule 8A, cautionary instructions must be given by the trial judge, note-taking by jurors occurs during the entire instructions and most usually begins at the commencement of the evidence at the outset of the trial. The Rule makes no provision for note-taking of only selected portions of the jury instructions. The case at bar is unique and stands alone regarding the complete absence of

Cautionary instructions mandated by Superior Court Rule 8A.. (Tr.IX-36-37,70-71,153) The trial judge's sua sponte and surprise decision to implement note-taking for only the final two thirds of his instruction, exacerbated the absence of cautionary instructions as to the jurors' proper use of their notes. (Tr.IX 70-71)

Under Article XI of the Massachusetts Declaration of Rights, the "right of equal justice", Murphy v. Commissioner of the Department of Industrial Accidents 415 Mass. 218,233(1993), is more explicitly guaranteed in criminal prosecutions by the stronger protections of Articles I,X,XII and XXIX of the Declaration of rights, as explained in Commonwealth v. Porter, 10 Met. (51 Mass.) 263,278-279(1845), which held that, " It is manifestly of greater importance in order to effect such protections of the rights of parties, that the laws to which they are amenable shall be fixed and permanent, impartially applied to all persons and cases alike, and not fluctuating and variable." Id. The principles of equal protection and equal application of the law have consistently been held to require that the similarly situated persons receive similar due process protections. Commonwealth v. Angiulo, 415 Mass. 502,509 (1993); Commonwealth v. Arment, 412 Mass. 55,57-63(1992); Commonwealth v. Drunken, 356 Mass 503,507-509(1969)

Pursuant to the Fourteenth Amendment's Equal Protection Clause, it has also been held that, " When the law lays an unequal hand on those who have committed intrinsically the same quality of offense ... it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment"' Skinner v. Oklahoma, 316 U.S. 535,541(1942) and this principle pertains when procedural due process requirements are unequally applied. Jackson v. Indiana, 406 U.S. 715,724,729-730(1972). In this vein, the defendant enjoyed a right under the Equal Protection Clause that the Rule 8A cautionary instruction guidelines as held by Commonwealth v. St. Germain, supra at 266, be given to this jury because, " Justice must be evenhanded". Johnson v. Arizona, 462 F.2d 1352,1354 (9th Cir.1972); Myers v. Ylst, 897 F.2d 417,421-423(9th Cir. 1990); Flore v. White, 920 U.S. 23,120 S.Ct. 469 (2000). This principle applies similarly to the unequal and unrestricted procedure of not allowing note-taking except for the final two-thirds of the jury instructions, and creates a miscarriage of justice, when such an anomaly is contrasted with notetaking for the entire trial and/or for the entire jury instructions afforded in all other trials in this Commonwealth. Flore v.White, supra; Commonwealth v. Porter, supra.

**(c) The Trial Judge's Failure To Give
The Jury Proper Cautionary Instructions
Constituted A Clear Abuse Of Discretion**

The trial judge's failure to give the jury proper cautionary instructions (Tr.IX-36-37,70-71,153), violated the fundamental principle that a judge has no discretion to disregard or to otherwise contravene by an act or an omission, any rule of court which uses the mandatory term "shall" Torres v. Attorney General, 391 Mass. 1,13-14(1984), Cabral v. Sullivan, 961 F.2d 998,1001-1003(1st Cir.1992) and constituted a clear abuse of discretion. The trial judge also abused his discretion by failing to comply with the cautionary instruction guideline requirements of Superior Court Rule 8A which States that:

**Rule 8A
NOTES BY JURORS
(Applicable to all cases)**

In any case where the court, in its discretion, permits jurors to make written notes concerning testimony and other evidence, **the trial judge shall precede the announcement of permission to make notes with appropriate guidelines.** upon the recording of the verdict of verdicts, the notes of the jurors shall be destroyed by direction of the trial judge, **Jurors may also be granted permission by the trial judge to make notes during summation by counsel and during the judge's instructions to the jury on the laws.**
(Effective May 5,1978)

(emphasis added)

The Rule's explicit use of the mandatory word " shall" imposed a non-discretionary duty on the trial judge. Hashim v. Kalil, 388 Mass, 607(1988)

It may have been argued that since the Rule's clause on note-taking of instructions is separate from the balance of the Rule regarding note-taking, the trial judge had discretion not to give appropriate guidelines to the jury. The Court's ruling however, in Commonwealth v. St Germain, supra at 266, makes it beyond refute that the "appropriate guidelines" requirement of Rule 8A also applies to note-taking during jury instructions. The holding also indicates, "...a need to modify... the procedures now specified in rule 8A," Commonwealth v. St. Germain, supra at 269, to explicitly direct judges to give proper cautionary instructions for note-taking during a jury charge or to eliminate such note-taking based on the extreme risk of prejudice recognized by numerous state and federal courts arising from incorrect translation or even one word of the jury instructions reduced to written form. Written Instructions With A Criminal Jury, 91ALR 3rd, 382-414; Morris v. Woodford, 273 F.3d 826, 837-843 (9th Cir. 2001).

In this Commonwealth, only in cases in which the required cautionary instructions or appropriate guidelines were given to the jury, have convictions been affirmed. Commonwealth v. St. Germain, supra at 266 (Each juror's notes, "...the judge stressed were to serve only as the notes of the individual juror,"); Commonwealth v. Wilborne, supra at 253 (the jury was further instructed

to use their notes only to refresh their memories, not as authority to persuade fellow jurors."); United States v. Porter, 764 F.2d 1,12(1st Cir.1985) ("...the record shows the painstaking care the judge displayed when he instructed the jurors on their note-taking."); United States v. Oppon, 863 F.2d 141,148(1st Cir 1998) ("At the close of the evidence the court instructed the jury on the proper use of notes during deliberations."). In other jurisdictions, the trial judges cautionary instructions governing jury note-taking is the most crucial factor considered in analyzing the legal propriety of the note-taking procedure. Taking And Use Of Trial Notes By Jury, 36 ALR 5th, 255, Johnson v. State, 887 S.W.2d 957 (Texas, Cr. App.1994); People v. Tucker, 550 N.Y.S. 2d 1 (A.D. 1 Dept. 1990); People v. Valenti, 559 N.Y.S. 2d 666 (A.D. 2 Dept. 1990); State v. Triplett, 421 S.E.2d 511 (W.VA1992) 187 W,VA 760 (1992); People v Sundquist, 572 N.Y.S. 2d 410 (A.D. 3 Dept. 1991) The defendants were afforded a new trials in People v. Saunders, 467 N.Y.S. 2d 110 (Sup.1983) and Sligar v. Barlett, 916 F.2d 1383 (Oklahoma 1996), as no cautionary instructions were given by the trial judge on the use of notes taken by jurors into their deliberations. Error was found where, as here, the trial judge left it to the jury to select which portions of the charge each individual juror determined

were necessary to take notes on. Bolm v Triumph Corp., 397 N.Y.S. 2d 498, 58 A.D. 2d 1014, (1977) reversed on other grounds, 422 N.Y.S. 2d 969, 71 A.D. 2d 429 (4 Dept. 1979). Insufficient cautionary instructions regarding note-taking during jury instructions was held to be error because the instructions did not dissipate the potential for prejudice in People v. Sullivan, 559 N.Y.S. 2d 881, (A.D. 1 Dept. 1990) 160 A.D. 2d 161 (1st Dept. 1990). In a situation in which the trial judge fails to remind jurors through a cautionary instruction that their notes on the jury charge are only for their individual personal use, a defendant is deprived of his constitutional right to a fundamentally fair trial and reversal of the conviction is the appropriate remedy. People v. Morales, 559 N.Y.S. 2d 869 (A.D. 1 Dept. 1990) 159 A.D. 2d 86 (1st Dept. 1990); People v. Morales 562 N.Y.S. 2d 380 (1990); 165 A.D. 2d 725 (1990).

- (d) **The Trial Judge's Allowance Of Unrestricted Note-taking Of The Jury Instructions To Be Utilized During Deliberations Constituted Clear Abuse Of The Court's Discretion And Was Unconstitutional As Applied**

An automatic reversal of a criminal conviction is required when the record reveals "structural defects in the constitution of the trial mechanism which defy analysis by 'harmless error' standards".

Arizona v. Fulminante, 499 U.S. 279,309 (1991),

The plain language of Superior Court Rule 8A does not require specific restrictive cautionary instructions for note-taking regarding jury instructions (third sentence); the Rule mandates that jury notes be destroyed immediately once the verdict has been returned (second sentence); the Rule does not prohibit jurors orally re-reading translated notes of the instructions out of the defendant's presence during deliberations and it does not require or permit counsel or the defendant to inspect any such notes of the jury charge for accuracy prior to their re-reading or other consideration during jury deliberations. Given the fact that the Rule requires automatic destruction of the essential appellate record, to wit, the juror's notes, after return of the verdict and does not permit inspection prior to the verdict, the defendant contends that if the court holds that the trial judge's abuse of his discretion amounted to error, the Court must find that such a defect in the trial mechanism defies a harmless error analysis because of the absence of the notes and therefore, falls within the category of structural error that requires automatic reversal of the defendant's convictions.

The trial judge's instruction to the jurors to rely on their memory for the first third of his instructions (Tr.IX-36), while concomitantly informing the jurors that,"You will not need to take down

everything or even close to everything that I say..." (Tr. IX-37), "You do not need to take down all or even a major portion of what I'm saying," (Tr. IX-70) "... use these notebooks when and as you believe it would be helpful in making a notation reflecting what the status of the law is," (Tr. IX-37) "...You will not have a written transcript of these instructions with you, when you are in the jury room. So, use these notebooks in the manner you consider helpful (Tr. IX-37), "Don't be concerned with writing down what I say so much as in listening to what I tell you about the law" (Tr. IX-37); "...to the extent that you wish to do so, you make a note or two to assist you" (Tr. IX-70); on the "substantive law" (Tr. IX-36-37, 70-71), constituted a "complete abdication of judicial control over the process". Riley v. Deeds, 56 F.3d 1117, 1121 (9th Cir. 1995); United States v. Noushfar, 78 F.3d 1442, 1445 (9th Cir. 1996) This procedure also created an unconstitutional risk that the jurors' respective translations or interpretations as reflected in their notes of the instructions on the elements of the offenses would be orally read to the other jurors without the defendant and/or counsel being present in an incorrect form that the trial judge had not instructed the jury. Guam v. Marquez, 963 F.2d 1311, 1314-1316 (9th Cir. 1992); United States v. Noushfar, supra at 1444-1446; United States v. Noble, 155 F.2d 315, 318 (3rd Cir. 1946). The inherent risk of the

unreliability of the juror notes on jury instructions has been recognized and the absence of guarantees that jurors would record instructions completely and accurately has been held to require reversal. People v. Morales, supra, People v. Tucker, supra People v. Anderson, 542 N.Y.S. 2d 592 (A.D. 1 Dept. 1989), 151 A.D. 2d 335(1989). In situations in which neither the defendant nor trial counsel were allowed to inspect written instructions, based on jurors' notes, citing Rushen v. Spain, 464 U.S. 114,117(1983), the defendant was denied of the right to be present at all critical stages of the proceedings, as the Court recognized state "trial error" in Warner v. Zent, 997 F.2d 116, 131(6th Cir. 1993) in concluding that, "...if the error had occurred in a federal court, it might be arguable- although we obviously do not decide the point- that reversal on appeal would be virtually automatic, regardless of whether the defendant could show that the errors caused any significant prejudice". Id

In the instant case, where there was no inspection of the jurors' notes prior to deliberation or otherwise and the trial judge's instructions directed the jurors not to record everything that he said during the instructions, but rather to only record one or two things that the individual jurors felt were important, the procedure violated the Court's specific requirement that, "...written instructions... should be an exact reproduction of the judge's oral charge," Commonwealth v. Lavalley, 410 Mass. 641,652,N.15(1991), cited with

approval in Commonwealth v. DiBenedetto, 427 Mass. 414,422(1998), of Commonwealth V Martin, 424 Mass. 301,312,N.5(1997) (approved procedure where "the written instructions were verbatim of the Court's oral instructions"). The unbalanced and unrestricted note-taking procedure here falls within the category of cases where,"...it has been established that by allowing note into deliberations, the court is permitting the best note taker to dominate the deliberative process and thereby putting too much emphasis on the notes to the detriment of the independent recollections of all the jurors". Clemmons v. Sowders, 34 F.3d 352,357(6th Cir. 1994) Clearly, in the same vein, the trial judge's repeating the theories of joint venture and repeating the elements of the offenses, Commonwealth v. Santos, 402 Mass 775 (1988), in combination with unguided and unrestricted note-taking and no opportunity to take notes during the first third of the charge, which was most favorable to the defendant, conclusively shows that,"...the jury had the opportunity to give more consideration to separate portions of the charge rather than the total charge". United States v. Schilleci, 545 F.2d 519,524 (5th Cir. 1977); Cornett v. State, 436 N.E. 2d 765,766 (Indiana 1982) (discussing compound errors for written instructions unpurged information that might have caused the jurors to speculate upon the relative importance of any particular instruction")

By allowing the jurors to act as individual

recorders or stenographers charged with transcribing the oral instructions, the trial judge in effect, introduced into the jury's deliberations and allowed the deliberation to be governed by unknown translation of the instructions and unknown versions of the meaning of the instructions or of certain passages or words depending on the individual juror's level of education sophistication and intelligence or the unknown textual references by which the individual jurors attempted to copy portions of the instructions. Gibson v. Clanon, 633 F.2d 851,852-855(9th Cir. 1980) Individual interpretation or misinterpretation by twelve different lay stenographers does not satisfy the fundamental requirements of equally and evenly applied, fixed and permanent laws guaranteed the defendant by Articles I,X,XI,XII and XXIX of the Massachusetts Declaration of Rights. Commonwealth v. Porter,supra at 278-279. The great risk of a miscarriage of justice inherent in the procedure instituted by the trial judge here, is illustrated by the holding in Morris v. Woodford, supra at 837-843, which vacated a death penalty solely on a three letter typographical error in written instructions which was not noticed by counsel or the court, but which changed the word "without" to "with".

Id

The trial judge's continuing reference in the last two thirds of the instructions to the term "substantive law" six times (Tr.IX-26-27,70-71), exacerbated the prejudice to the defendant as it,

"...contained a negative pregnant as well," Cool v. United States, 409 U.S. 100,102-103,n.3(1972), that implied,"...the first part deal(ing) with matters of general applicability" (Tr. IX-36), equalled something less than "substantive law". Lanigan v. Maloney, 853 F.2d 40(1st Cir. 1988). This bifurcation trivialized and belittled the prior presumption of innocence and proof beyond a reasonable doubt instructions by relegating these primal concepts to something less than "substantive law", which had added the effect of unconstitutionally reducing the Commonwealth's burden of proof by making these legal principles, less important and less worthy of distinct clarity in the jurors' notes and minds during deliberations, Commonwealth v Repoza, 400 Mass. 516(1987); Commonwealth v. Lennon, 399 Mass. 443(1987); Commonwealth v. Mulica 401 Mass.812 (1988); Commonwealth v. Skinner, 408 Mass. 88 (1990), because the trial judge's "...lightest word or intimation is received deference and may prove controlling". Quercia v. United States, 289 U.S. 466, 470(1933). Moreover,"human experience teaches that people frequently give special credence to the written word, cf. e.g., Job 19:23, (" Oh that my word were now written")...(and when) a fragment of the charge in written form (is presented during deliberations), the danger of over-emphasis is acute". United States v. Parent, 954 F.2d 23,26(1st Cir 1992)

The trial judge's repeated emphasis on the Commonwealth's theories of the defendant's guilt and the unnecessary repeated distinction between the "substantive law" and by inference, the "non substantive law", resulted in a situation, "...when judicial comment has exceeded fair guidance and attempted to lead the jury to a particular verdict, the comment carries a high risk that it influenced the jury". Traynor, The Riddle Of Harmless Error, at 71-72(1970), cited in Anderson v. Warden, 696 F.2d 296,301-302,N.1(4th Cir. 1982 en banc) By not providing

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- 4 See also, Payne v. State, 395 So.2d 284 (Fla. App. (1981) (partial written instructions on premeditated murder constituted reversal error); State v. McCloud, 349 N.W.2d 590(Minn. App. 1984) (partial instructions in written form on substantive charges, but not on defense, held to be error as instruction procedure was unbalanced); People v. Hill, 519 N.Y.S. 2d 549,133 A.D.2d 56(1987)(criticizing portion of written instructions on substantive offenses only); People v Westergren, 520 N.Y.S. 2d 774,134 (A.D.1 Dept.1987)2d 186(1987) (criticizing written portions of charge only on "the statutory law of the case"); People v Valle, 531 N.Y.S. 2d929 (A.D.2 Dept.1988),143 A.D. 2d 160(1980) (criticizing elements of offense submitted to jury in written form); Zarattini v State, 571 So.2d 553 (Fla. App.4,Dsit.1990) (error to submit partial and not entire jury instructions in written form); Commonwealth v. Byrd, 598 A.2d 1011 (PA.Super.1991)(finding prejudice from submitting elements of offense in written form to jury); Grimes v State, 404 S.E.2d 324(GA.App.1991), 199 GA App 152 (1991)(error to submit partial excerpts of written instructions to jury); People v Sotomayer, 569 N.Y.S. 2d 973,(A.D.2 Dept 1991)173 A.D. 3rd 500(1991) (criticizing partial written instruction); People v Johnson, 584 N.Y.S. 2d 32, (A.D. 1 Dept.1992)185 A.D. 613 (1992)(finding prejudice from written elements of offenses being submitted to jury).

judicially controlled written instruction guidelines, but rather placing his thumb on the scales of justice through a procedure that "...gave the jury a one sided view of the case", United States v Van Dyke, 14 F.3d 415, 423 (8th Cir. 1994), the trial judge committed prejudicial error which requires that the defendant be afforded a new trial.

(e) Trial Counsel's Failure To Request Appropriate Guidelines And/Or Cautionary Instruction, Failure To Object To The Unbalanced And Unrestricted Instructions And Failure To Request Inspection And/Or Preservation Of The Jurors' Notes Constituted Ineffective Assistant Of Counsel

In this Commonwealth, note-taking by jurors must be preceded by the trial judge giving the jury appropriate guidelines and/or cautionary instructions as to how their notes may be utilized. Superior Court Rule 8A, Commonwealth v. ST. Germain, supra at 265-266, N.15, 16, 17; Commonwealth v. Wilborne, supra at 253. It is equally well settled that this is the procedure to be followed in the district courts for the First Circuit. United States v Porter, supra at 12; United States v. Oppon, supra at 148. There were no such guidelines or instructions in the instant case and trial counsel voiced no objection to the note-taking procedure and failed to request appropriate guidelines or cautionary instructions, failed to object to the unbalanced and unrestricted instructions and failed to request inspection and preservation of the jurors' notes. Therefore, the question arises as to whether trial counsel's omissions were strategic or whether, "...his silence arose from incompetence and ignorance of the law, rather than strategy". Washington v Hofbauer, 228 F.3d

689,704(6th Cir. 2000).

The record demonstrates that there was no strategic reason for trial counsel's failure to request that in accordance with Superior Court Rule 8A, that the trial judge give the jury appropriate guidelines regarding their note-taking (Tr.IX-36-37,70-71,153-156), White v McAninch, 235 f.3d 988,997-999(6th Cir.2000), especially in this case based on circumstantial evidence with alternative suspects. Commonwealth v Salemme, 395 Mass. 594(1985), Commonwealth v Mazza 399 Mass. 395(1987). " Failure to make the request was highly prejudicial to the (defendant) to the extent that the fundamental fairness of the proceeding and the conviction was undermined...(resulting in) a denial of a fair trial". Freeman v Class, 95 F.3d 639,642(8th Cir.1996); Commonwealth v Gelpi, 416 Mass. 729,730-731(1994); Commonwealth v Pelouquin, 52 Mass.App. Ct.480(2001). Counsel's omission also prejudiced the defendant by placing him at risk of a stricter miscarriage of justice standard of appellate review,Commonwealth v. Fernandes, 427 Mass.90(1998) and at risk of later losing federal habeus corpus review pursuant to 28 U.S.C. §2254, if the defendant is not relieved of the procedural bar. Puleio v. Vose,830 F.2d 1197(1st Cir. 1987); Murray v. Carrier, 477 U.S. 478(1986). The trial counsel's additional failure to object to the trial judge's instituting note-taking for only the last two thirds of the instructions and failure to object to the unrestricted and unvalanced instruction, resulted in a complete breakdown of the adversarial testing process that the criminal justice

system relies on to produce just results. Strickland v. Washington, 466 U.S.668,696(1984).

Trial counsels failure to object to the note-taking procedure, amounted to constitutionally deficient and prejudicial ineffective assistance of trial counsel. Lucas v. O'dea, 179 F.3d 412(6th Cir.1999); Oyola v. Bowers, 947 F.2d 928,930-933(11th Cir. 1991); Corsa v Anderson, 443 F.Supp. 176,178(E.D. Mich. S.D.1977). See also, Commonwealth v. Karaffa, 709 A.2d 887,889-890(pa. 1998) ("counsel was ineffective for failing to object to the use of written instructions because" a jury would likely assess undue weight to the points of law in written instructions and possibly misinterpret or missapply the law, as well as, giving"...undue emphasis to portions of the charge(which) has the potential of undermining the integrity of the deliberation process".) Note-taking during the charges personifies the danger of,"...written instructions(which) is intrinsically prejudicial and it is this intrinsic, unfair prejudice that requires granting a new trial". Id.at 890.

It must also be noted, however, that the surprise announcement after argument that the trial judge intended to institute a note-taking procedure for a portion of the jury instructions (Tr.IX-36-37), Denied trial counsel an opportunity to argue against the proposed procedure at the charging conference held pursuant to Mass.R.Crim.P 24(Tr.X-3-10),Which served to deprive the defendant of his right to the effective assistance of counsel, Conde v. Henry, 198 F.3d 734,739(9th Cir. 1999) and made a post

implementation objection to the procedure futile.

The surprise implementation of the note-taking procedure falls under the narrow exception excusing the failure of counsel to make a contemporaneous objection. Taking And Use Of Trial Notes By Jury, supra, 36 ALR 5th at 285. "Where (as here) the trial judge, sua sponte and without specifically affording the parties a chance to object, permitted the jury to take notes during the trial although no juror requested to do so," the Court in State v. Waddell, 498 N.E.2d 195(Ohio App. 1985), 26 Ohio App. 3d 33, held that note-taking constituted reversal error. The Court stressed that the trial judge made it clear that counsel's objection would be fruitless since the judge had already made the determination to permit note-taking and the court therefore found that no objection was required. Id

In the instant case, the trial judge discussed other areas of the verdict forms (Tr.VIII-9-10), stated that the instructions he discussed covered "the essence of what we addressed... in the lobby conference. If I've left anything out..."(Tr.VIII-8) advise the Court. Neither the prosecutor nor trial counsel mentioned the Courts intention to institute note-taking of two thirds of the instructions as a lobby conference issue not raised at the recorded charge conference.(Tr.X-3-10)

Furthermore, the trial judge's preliminary instructions indicate that counsel was misled and that if the trial judge intended to utilize note-taking for only the jury instructions, he concealed his intention when he made the following reference to note taking at the outset of the trial:

The remarks I make at this time are not a substitute for more-detailed instructions on the law, which I will give to you at the conclusion of the trial before you retire to consider your verdict.

Now the first thing that I want to impress upon you is the fact that you are going to be listening and observing the witness and the evidence. **You are not going to be taking notes. You will not have the benefit of notes of testimony,** when you go into the jury deliberation room. Neither will you have with you excerpts from testimony read back to you in the jury room. It is very important, now, because you only get the opportunity to hear the witnesses, once. Jurors sometimes ask me if they can have a portion of the testimony read back to them. And I tell you, now, that's not going to happen. (Tr.II-18-19) (emphasis added)

You have just heard the clerk read the indictments. The indictments are in statutory form and have a particular language. I ask you not to assume that you know **what the legal elements** are that make up those indictments. **I will instruct you, in detail, at the conclusion of trial on the elements of the law which make up these indictments....** (Tr.II-20)(emphasis added)

The trial judge's preliminary instructions in combination with his comment at the outset of his final instructions that jurors sometimes ask questions about note-taking procedures during the instructions (Tr.IX-36), supports the inference that the trial judges routinely implemented partial note-taking procedures

and concealed this fact from the trial counsel at the commencement of trial, through the charging conference and closing argument.

Trial counsel should have moved to inspect the jurors' written versions of the instructions which were to be taken into and relied upon in their deliberations. In Warner v. Zent, supra at 131, the reviewing court's comparison of "the transcript of the oral instructions given in open court and the written version set forth in the joint appendix," resulted in a harmless error finding because that the court was, "...satisfied that there are no prejudicial discrepancies" Id. at 131. Consequently, when faced with the unbalanced and unrestricted note taking procedure here, trial counsel after objecting to the procedure, should have also moved to inspect the jurors' notes for accuracy and/or discrepancies, Morris v. Woodford, supra at 837-843, and requested that the notes be preserved for appellate review. If the Court insisted on destroying the notes, counsel should have challenged that ruling and Rule 8A as being unconstitutional because destruction of the notes makes appellate harmless error review impossible. Trial counsel's failure to inspect and preserve the jurors' notes eviscerated the defendants ability to demonstrate prejudice and the destruction of the record further supports the court should have ordered the defendant a new trial, see, Commonwealth v. Harris, 387 Mass. 758, 759-763, 766-767 (1982) as his right to effective assistance of counsel was violated.

The defendants convictions must be reversed.

II. WHETHER THE MASSACHUSETTE APPEALS DECISION WAS CONTARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT WHEN DENYING PETITIONERS ISSUE THAT THE DEFENDANTS RIGHTS TO A FUNDAMENTALLY FAIR TRIAL AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY THE COUNSEL'S FAILURE TO OBJECT TO A PREJUDICIAL INSTRUCTION, FAILURE TO PRESENT THE TESTIMONY OF THE DEFENDANT AND OTHERS, AND FAILURE TO MAKE A CLOSING ARGUMENT ON TWO INDICTMENTS, AND CONCEDING THE DEFENDANTS GUILT.

In addition to failing to object to a prejudicial instruction which invaded the province of the jury, trial counsel's failure to present a full intoxication defense, failure to present the testimony of the defendant to support his intoxication and other perpetrator defenses, failure to make a closing argument on two indictments and conceding the defendants guilt on a third indictment, and failure to call forth support testimony from others, violated the defendant's rights to a fundamentally fair trial and to the effective assistance of counsel guaranteed him by Article XII of the Massachusetts Declaration of Rights, as well as, by the Sixth and Fourteenth Amendments to the Constitution of the United States.

The unbalanced instructions on the Commonwealth's theories of the defendant's guilt in combination with prejudicial flaws in the charge, trial counsel's non-strategic failure to present a full intoxication defense and the defendants testimony, as well as, trial counsel's purported closing argument, requires a cumulative error analysis. Commonwealth v. Cancel, 394 Mass. 567(1985); Commonwealth v. Bassett, 21 Mass.App.Ct. 713(1986);

Commonwealth v. Skinner, supra at 88; Commonwealth v. Licata, 412 Mass 654,660-662(1992); Commonwealth v. Farley, 432 Mass. 153,156-157(2000); Rodriguez v. Hoke, 928 F.2d 534,538(2nd Cir. 1991); United States v. Gray, 878 F.2d 702,708-713(3rd Cir. 1989); Berryman v. Morton, 100 F.3d 1089,1095-1102(3rd Cir. 1996); Griffen v. Warden, 970 F.2d 1355,1357-1358(4th Cir. 1992); Moore v. Johnson, 194 F.3d 586,622(5th Cir. 1999); Blackburn v. Foltz, 828 F.2d 1177, 1186(6th Cir. 1987); Cooper v. Sowders, 837 F.2d 284, 288(6th Cir. 1988); Williams v. Washington, 59 F.3d 673, 682(7th Cir. 1995); United States v Beckman, 222 F.3d 512,524-527(8th Cir. 2000), United States v. Sanchez, 176 F.3d 1214,1218-1225(9th Cir. 1999); Mahorney v. Wallman, 917 F.2d 469,473 N.3,474(10th Cir. 1990); United States v. Hanos, 184 F.3d 1324,1334(11th Cir. 1999).

Since trial counsel failed to object, this Court must find that a, "substantial risk of a miscarriage of justice exists where that Court would have unanimously ordered a new trial if an exception had been saved". Commonwealth v. Alphas, supra at 13, N.6.

(a) **Instructional Error Eviscerated The
Defendant's Other Perpretrator Defense
And Trial Counsel Had No Strategic Reason
For Failing To Object**

During the course of the trial, counsel was not notified that the evidence adduced showing that the co-defendant was the leader and principal, could be held at a later stage of the trial to be irrelevant. At the charging conference, during the discussion regarding

principal and joint venture liability, no warning was given by the trial judge to trial counsel that his other perpetrator defense theory was irrelevant. (Tr. X-6-10) Pursuant to the reasonable understanding that it was relevant, trial counsel devoted the entire last third of his closing argument to an other "perpetrator defense" that the victim was murdered by co-defendant, John Keegan, as the principal. Or the defendant was a less culpable accessory in a joint venture on the other indictments. (tr. XI-15-20)

The Commonwealth did not indict the defendant under a joint venture murder theory and therefore, he was tried solely as the principal in the murder, Lucas v. O'dea, supra at 417; Watson v. Jago, 558 F.2d 330,334-339(6th Cir. 1977), and consequently, that John Keegan was the sole principal perpetrator was extremely relevant, Commonwealth v. Graziano, 368 Mass. 325,329-330(1975); Miller v. Angliker, 848 F.2d 1312,1323(2nd Cir.1988); Henderson v. Sargent, 926 F.2d 706,708,N.3,710-712(8th Cir. 1991) grant of writ on rehearing, 939 F.2d 586(8th Cir. 1991); Jones v. Wood, 207 F.3d 557,560-563(9th Cir. 2000); Bowen v. Maynard, 799 F.2d 593,611-613(10th Cir. 1986); Troedel v. Wainwright, 667 F.Supp.1456,1457-1464 (S.D.FLA 1986) grant of writ affirmed 828 F.2d 670(11th Cir. 1987); Kyles v. Whitley, 514 U.S. 419(1995); especially where the jury had to choose between two possible principals at the murder scene. Commonwealth v. Salemme, supra; Troedel v Wainwright, supra; Chambers v. Mississippi, 410 U.S. 284 (1972), Lucas v.O'Dea, supra

at 417.

Constitutional error occurs if, "... there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence". Boyde v. California 494 U.S. 370, 380(1990); Brecht v. Coleman, 525 U.S. 141, 145-146(1998). In the instant case. the trial judge instructed the jurors that:

To begin with, an individual cannot be both a principal and a joint venturer at the same time, in the commission of the exact same crime in the exact same way. **There can be more than a single principal** in the commission of a particular crime, however. **When an individual, such as Timothy Dykens, is alleged to be a principal**, the Commonwealth alleges that he, himself, performed the essential elements of the particular crime. **Whether someone else may have been a principal is irrelevant to this trial.** (Tr.XI-74)(emphasis added)

The trial judge repeated two additional times that, "...there can be two principals to a crime"(tr.XI-88, 104), although "dual principal liability theory" was not relevant to this case, Commonwealth v. Lamrini, 392 Mass. 427,434-435(1984) and could serve to lesson the jury's consideration of the defendant's defenses. Because the jurors had been repeatedly instructed to take notes on the substantive law (Tr,XI-70-71) only moments before the trial judge informed them that, "... when an individual, such as Timothy Dykens, is alleged to be a principal... whether someone else may have been a principal is irrelevant to this trial,"(Tr.XI-74), it cannot be asserted that the jurors did not record

this instruction or adopt it during deliberations and restate it to the other jurors.

The defendant's defense and closing argument focusing on John Keegan was highly relevant, "...as such as evidence (was) central to (the defendants) claim of innocence," Crane v. Kentucky, 476 U.S. 683,690(1986), and was at, "...at (the) heart of the right to present a defense," Pettijohn v. Hall, 599 F.2d 476,483(1st Cir. 1979). By informing the jury that the question of whether John Keegan was the principal who killed the victim as irrelevant (Tr.XI-74,88,104), the trial judge invaded the province of the jury, Commonwealth v. Cote, 5 Mass. App.Ct. 365(1977); Commonwealth v. Foran, 110 Mass. 179(1872), thereby eliminating the jury's consideration of all evidence pointing to Keegan, Commonwealth v. Mulica, supra at 818-819 and eviscerating the defendants defense. (Tr.XI-15-20) Conde v. Henry, supra at 739-742; Herring v. New York, 422 U.S. 853,858-865(1975); Commonwealth v. Gilmore, 399 Mass. 741,744-745(1987).

In light of the fact that trial counsel's argument that Keegan was the principal was extremely relevant (Tr.XI-15-20), counsel's subsequent failure to object (Tr.XI-153-154) to the instruction that Keegan being the principal was irrelevant,(Tr.XI-74,88,104), was non-strategic error that, "...likely deprived the defendant of an otherwise available substantial ground of defense". Commonwealth v. Kane, 19 Mass.App.Ct. 129 142(1984). The resulting prejudice from eliminating the jury's consideration of the other perpetrator

evidence, Commonwealth v. Mulica, supra and trial counsel arguments based thereon, Conde v. Henry, supra at 739, indicates that counsel's failure to object to the instruction amounted to prejudicial ineffective assistance of counsel. Kubat v. Thieret, 867 F.2d 351,370-371;(7th Cir. 1989); Gray v Lynn, 6 F.3d 263,269-270(5th Cir 1993); Oyola v Bowers, supra at 930-933.

Because some,"..courts have not hesitated in finding ineffective assistance of counsel based upon isolated-but important errors", Prou v. United States, 199 F.3d 37,48(1st Cir. 1999), this isolated omission by trial counsel standing alone requires that the defendant be afforded a new trial. For,"..The failure of counsel to object to the jury instructions in question rendered his defense-that he did not (kill the victim, because Keegan killed her)- meaningless", Lucas v. O'Dea, supra at 419, and the court must, "..conclude that the instruction in the present case had the effect of directing a verdict of guilty on the murder charge".Id

(b) Trial Counsel's Failure To Present A Full Intoxication Defense And Failure To Present The Defendants Testimony Along With Others Was The Equivalent Of A Concession Of Guilt

At trial, two defenses were partially presented by trial counsel; to wit, intoxication and another perpetrator. In regard to the intoxication defense, trial counsel had Eric Swindell acknowledge that his statement to

the police, he stated that when he observed the defendant at 12:03-12:04 a.m. on June 2, 1996, the defendant was "real drunk". (Tr. IV-45, 50, 54) Trial counsel called Peabody Police Officer Conway to testify that at 3:00 a.m., the defendant still emitted a strong smell of alcohol, he was unsteady on his feet and after making a determination that the defendant was intoxicated, placed him in protective custody for his own safety. (Tr. IX 52-54) The dancer from the Golden Banana, Cheryl Parrott, testified that on June 1, 1996, sometime after 8:00 p.m., the defendant asked her to have a drink with him, they shared a pitcher of beer and she observed the defendant and Keegan drinking steadily for about 2½ to 3 hours. (Tr. II-75, 77-78, 83) Based on the evidence trial counsel announced his intention to rely on intoxication in his opening statement (Tr. II-43-44), he devoted one third of his closing argument to an intoxication defense (Tr. XI-10-15), and he sought (Tr. X-7-8) and obtained intoxication instructions. (Tr. XI-79-80, 90-91, 105, 117, 122, 126, 136-137, 148) the instructions on intoxication, however, merely explained that such evidence could be considered, however, the instructions did not specify the degree of intoxication necessary to negate specific intent nor did they otherwise explain how jurors were to weigh intoxication or apply such evidence to the issue of specific intent.

Id.

Since Saturday, June 1, 1996, was a busy night, Parrott was required to work a double shift with at least five other dancers (Tr. II-73-74-75, 81-83) at the bar which seats 30 to 40 patrons around the main stage while other patrons observe performers on another stage. (Tr. II-74-75, 81-83) Although Parrott could not specify the quantity of alcohol that the defendant consumed in addition to or after the pitcher of beer that they shared, (Tr. II-77-78), trial counsel did not introduce the testimony of the bartenders, other dancers or patrons who present that evening.

Officer Conways report stated that the defendant "...said they had split 4-5 pitchers of beer at the Golden Banana"(a-37). After a statement at side bar by the prosecutor that, "He's going to try and put in that there were 4 or 5 pitchers of beer or something like that ...that sounds to me like a self serving statement by the defendant which would be objectionable hearsay" (Tr. IX-46), Trial counsel failed to attempt to introduce this statement or admission by the defendant during Conway's direct testimony. (Tr. IX-48-54) Moreover, after the Commonwealth opened the door to the admission of this statement by inquiring during cross examination whether the defendant's statements to Officer Conway were coherent (Tr. IX-56-57), counsel failed to introduce the 4 or 5 pitchers of beer statement by not pursuing

redirect examination of Conway for their substantive value or for their value on the issue of voluntariness (Tr.IX-57 Crane v. Kentucky, 476 U.S. 683,691(1986)).

Trial counsel's failure to investigate or interview the bartenders, dancers and patrons at the Golden Banana was based on his reliance on introducing the defendant's statement contained in Officer Conway's report. (Tr.XI-46) This Court must find that counsel's failure to summons and present testimony regarding the defendant's intoxication from either of these witnesses to buttress and otherwise support the intoxication evidence at trial, was non-strategic error falling, "...measurably below that which might be expected from an ordinary fallible lawyer". Commonwealth v. Street, supra at 287-288; Chambers v. Armontrout, 907 F.2d 825,830-831(8th Cir. 1990); Williams v. Washington, supra at 681. Trial counsel's failure to attempt to introduce Officer Conways report regarding the defendant's statement (Tr.IX-46-57), notwithstanding the trial judge's clear invitation to consider admitting the report at a sidebar conference (Tr.IX-47), deprived the defendant of substantial corroborating evidence which amounted to ineffective assistance of counsel. Helton v. Secretary for Department of Correction, 233 F.3d 1322,1324-1327(11th Cir. 2000); DePetrìs v. Kuykendall, 239 F.3d 1057,1062-1065 (9th Cir. 2001); Hart v. Gomez, 174 F.3d 1067,1070(9th Cir. 1999).

In regard to the available evidence of the defendant's consumption of numerous pitchers of beer immediately prior to the charged offenses, the docket entries reflect that a

motion for funds to retain an expert in the field of intoxication was not filed. (A-3,11,19) Given the defendant's defense, as a matter of course, such an expert should have been at least consulted and his potential testimony evaluated. Trial counsel's failure to retain an expert in the precise field supporting a defense theory, requires this Court to order that the defendant be afforded a new trial. Genius v. Pepe, 50 F.3d 60,61(1st Cir. 1995)

In the context of the evidence produced at trial, it was more than obvious that the defendant would be convicted if he did not testify regarding his state of intoxication so that he was not able to share the intent of the principal John Keegan when Keegan attacked and killed the victim. Therefore, this Court must find that a competent attorney would have necessarily presented the defendant's testimony at trial. The record indicates that after the trial judge suggested that the defendant discuss the issue with counsel (Tr. IX-98), trial counsel advised the Court that, "Mr. Dykens... is comfortable with the fact that he's going to accept my advise and not testify". (Tr. X-3) (emphasis added) This statement, Commonwealth v. Rosado, 408 Mass. 561,568(1990) conclusively demonstrates that the defendant followed counsel's advice was which now presents the question of whether such advice was manifestly wrong. United States v. Butts, 630 F.Supp. 1145,1146-1149(d. Me. 1986); DeLuca v. Lord, 858 F.Supp.1330,1358-1364(S.D. N.Y. 1994).

Where, as here, in addition to the defendant being the best witness as to the degree of his extreme intoxication, which trial counsel focused on as a matter of strategy, and trial counsel's focusing on the "other principal perpetrator defense" that Keegan was solely responsible as stated in his opening statement(Tr.II-43-44) and closing argument (Tr. XI-15-20), requires that this Court hold that trial counsel's advice to the defendant not to testify that Keegan attacked and killed the victim was manifestly unreasonable. Commonwealth v. Licata, *wsupra*; Deluca v. Lord, *supra*. "In short, the defendant was denied a fair trial due to counsel's lack of preparation and failure to investigate and develop the evidence which could have supported the defendant's defense and which could have raised a reasonable doubt in the minds of the jurors". Commonwealth v. Farley, 432 Mass. 153-157(2000).

(c) Multiple Omissions During Argument In Light Of The Unbalanced Jury Instructions Which Increased The Likelihood Of Conviction, Resulted In A Breakdown Of The Adversarial Process

Trial counsel rendered ineffective assistance of counsel to the defendant by failing to raise an obvious flaw, Grady v. Artuz, 931 F.Supp. 1048,1063-1064(S.D.N.Y. 1996) in the duplicitive kidnapping offense being a lesser included offense subsumed within the attempted aggravated rape charge by means of the joint venture kidnapping incident. Commonwealth v. Gagnon

37 Mass.App.Ct 626(1994), affirmed 419 Mass. 1009(1995);
Commonwealth v. D'Amour, 428 Mass.725,747-750(1999);
Rutledge v. United States, 517U.S. 292,298-300(1996).

By allowing a lesser included offense to be tried with a greater offense, and by failing to move that the Court compel the Commonwealth to elect between the duplicitive offenses, or move to dismiss the lesser kidnapping indictment, counsel allowed the defendant to be prejudiced by reason of the jury considering multiple indictments that the unbalanced jury instructions focused on. The trial judge's kidnapping instruction included the overly broad explanation that, "...any restraint of a person's liberty is confinement or imprisonment,"(Tr.IX-86) and this flaw spilled over to the aggravated attempted rape instructions which were repeated at least nine times. (Tr. IX-93_107) If "any restraint" was sufficient, then virtually every charge of rape in this Commonwealth would be aggravated under the kidnapping instruction given in this case. Gray v. Lynn,supra at 268-271.

In regard to the kidnapping and attempted aggravated rape indictments, trial counsel's closing argument failed to mention each of those indictments entirely(Tr.XI-4-20) and "...did not marshall the evidence favorable to the defendant's defense in an effort to create a reasonable doubt". Commonwealth v. Farley, supra at 157. Trial counsel also conceded the defendant's guilt as a joint venturer to kidnapping, attempted aggravated rape charges and perhaps, to second degree murder by

concluding his argument with the statement that;

I cannot stand before you and tell you that Mr. Dykens is blameless. Clearly he is not. But, he is not, to the degree that Mr. Keegan is, responsible for this death of Kristen Crowley.

(Tr. XI-20)(emphasis added)

This very last statement of trial counsel was followed by the Commonwealth taking advantage of the concession by arguing that only the defendant Dykens' actions supported guilty findings. (Tr. XI-20-34) The trial judge eviscerated trial counsel's "limited responsibility argument" of placing the blame on Keegan as the principal (Tr. XI-15-20), by having the jurors take notes (Tr. XI-70-71) on his instruction that, "...when an individual such as Timothy Dykens is alleged to be a principal ... whether someone else may have been a principal is irrelevant to this trial". (Tr. XI-74) Trial counsel rendered prejudicial ineffective assistance to the defendant Commonwealth v. Street, supra at 287-288, causing a breakdown in our adversarial system". Conde v. Henry, supra at 739

The defendant's conviction must be reversed

**WHETHER THE MASSACHUSETTS APPEALS DECISION
WAS CONTRARY TO OR INVOLVED AN UNREASONABLE
APPLICATION OF CLEARLY ESTABLISHED FEDERAL
LAW, AS DETERMINED BY THE SUPREME COURT WHEN
DENYING PETITIONERS ISSUE THAT THE JUDGE
COMMITTED ERROR BY CLOSING THE COURTROOM
DURING JURY INSTRUCTION WITHOUT
MAKING FINDINGS**

The trial judge committed structural error by
implementing a surprise, arbitrary and unique courtroom
closure procedure during jury instructions

without making specific findings as to the need for closing the courtroom. (Tr. XI-34) Moreover, trial counsel had no strategic reason for failing to object to this procedure and for failing to request that findings be made as to the need for this procedure. The implemented procedure was arbitrary and capricious and contravened the evenly and impartially applied fixed and permanent law requirements of Articles I, X, XI, XII and XXIX of the Massachusetts Declaration of Rights, Commonwealth v. Porter, supra at 278-279; Murphy v. Commissioner, supra at 233. as well as, the Equal Protection Clause of the Fourteenth Amendment, Johnson v. Arizona, supra at 1354; Myers v. Ylst supra at 423.

"There is nothing in the Constitution of the Commonwealth corresponding to the right to a 'public trial' expressly granted by the Sixth Amendment to the Constitution of the United States," Commonwealth v. Blondin, 324 Mass. 564, 570 (1949) and consequently, the issue under state law is whether the defendant can be singled out for courtroom closure when ever judge in this Commonwealth does not close their respective courtrooms during jury selection and final instructions. The right to a public trial under the Sixth Amendment applies to the states through the Fourteenth Amendment, Duncan v. Louisiana, 391 U.S. 145, 148, N.10 (1968) and the SJC recognized that this right governs trials in the Commonwealth. Commonwealth v. Marshall 356 Mass. 432, 435 (1969) In Re Oliver, 333 U.S. 257, 270-272, N.25, N.29 (1948). "The traditional Anglo-American distrust for secret trials has been variously ascribed

to the notorious use of this practice by the Spanish Inquisitions, to the excesses of the English Court of Star Chamber, ...Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution". Id at 268-270. "Essentially the public trial guarantee embodies a view of human nature, true as a general rule, that judges... will perform their... function more responsibly in an open court than in a secret proceedings". Estes v. Texas, 381 U.S. 532,588(1965) (Harlan,J., concurring) This fact has proven to be accurate because,"... the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power". In Re Oliver, supra at 270.

At the outset of his final instructions to the jury, the trial judge announced that:

I also address myself to the men and women in here watching this trial as observers. When I begin my final instructions, **no one will be allowed to enter the courtroom or to leave it.** So, if you wish to be in the courtroom during final instructions, you have to understand that you are not going to be able to go during the course of those instructions. **And the court officers will see to that.**

(Tr. XI-34)(emphasis added)

there was no reason for the implementation of this procedure. The unbalanced note-taking procedure, concomitantly utilized by the trial judge, in combination with the closing of

the courtroom, gives the appearance that the trial judge's placing his heavy hand on the scales of justice against the defendant was intended to be concealed from anyone who arrived late to attend the later part of the jury instruction stage of the trial. The trial judge's order that, "...no one will be allowed to enter the courtroom or leave,"...an hour and a half or maybe even more,"(Tr.XI-34) may have caused spectators who needed to leave the courtroom for however brief a period (ie. to use a restroom) to leave and not return based on the threat that they could not leave regardless of the reason. The coercive effect that court officers would be utilized to enforce the judge's announcement must also be recognized as further restricting the defendant's rights to a public trial. The trial judge's announcement in the presence of the jury may also have had an adverse impact on the jurors' continued impartiality. Quercia v. United States, supra at 470

In light of the fact that the trial judge's order did not involve limited exclusion of only a certain category of witnesses falling within a "partial-closure" order, Guzman v. Scully, 80 F.3d 772,775(2nd Cir 1996) ⁵ because, "...the trial court's orders in this case made no exceptions for members of the press or for relatives of the defendant", this Court must "apply the overriding interest standard"

5 Because the trial judge made clear his intentions intention to exclude the public from entering the courtroom in the most forceful manner(Tr.XI 34), this court cannot find that the closure was "entirely inadvertent" to avoid a constitutional analysis of the error. Peterson v. Williams, 85 F.3d 39,44(2nd Cir. 1996)

Davis v. Reynolds, 890 F.2d 1105,1109-1110(10th Cir. 1989), articulated in Waller v. Georgia, 467 U.S. 39, 48 (1984), which involves the following four factors: One, the state must, "...advance an overriding interest that it is likely to be prejudiced" if closure does not occur. Because the trial judge issued the closure order sua sponte, the record is capable of only one possible rational for the order, to wit, the interest of the judge in not being interrupted or jurors not being distracted during the jury instruction stage of the trial. Such a speculative interest, however, cannot satisfy the "overriding interests" in avoiding "prejudice". Also , the constitutional principle would effectively be negated and the exception would essentially swallow the rule if locking doors to the courtroom for every jury trial in the Commonwealth during the jury instruction stage was condoned under the same circumstances as existed in this case. State v. Bone-Club, 906 P.2d 325,329 (Wash. 1995),128 Wash.2d 254 (1995); People v. Rodriguez , 618 N.Y.S. 2nd 335,(A.D. 1 Dept. 1994) 209 A.D. 2d 237,239(1994), Vidal v. Williams, 31 F.3d 67,69(2nd Cir. 1994)

The second and third portions of the Waller analysis, that, "...the closure must be no broader than necessary to protect the interest" and "...the trial court must consider reasonable alternatives to closing the proceeding", certainly were not satisfied in the case at hand.

A narrowly tailored procedure to afford entry for late arriving members of the public and seating them at the rear of the courtroom clearly would have sufficed. Guzman v. Scully, supra at 776; United States v. Peters, 754 F.2d 753,761 (7th Cir. 1985).

In regard to the fourth factor that the trial court, "...must make findings adequate to support the closure"; because the Court was precluded from "post hoc" fact finding that "cannot satisfy the deficiencies in the trial court's record"; Waller v. Georgia, supra at 49,N.8, the absence of fact finding requires that the defendant be afforded a new trial. Davis v. Reynolds, supra at 1112; Guzman v. Scully, supra at 776-777, English v. Artuz, 164 F.3d 105,109-110(2nd Cir. 1998).

Since the Commonwealth cannot be found to have satisfied even one of the strict four part test, Judd v. Haley, 250 F.3d 1308,1313-1320(11th Cir. 2001), for the blanket closure here, Globe Newspaper Co. v. Superior Court for Norfolk County, 457U.S. 596,607-608(1982) and a showing of prejudice is not necessary for reversal, Commonwealth v. Marshall, supra at 435, Waller v. Georgia, supra at 49, for such "structural error", Johnson v. United States, 520 U.S. 461,468-469(1997); Neder v. United States, 527 U.S.1, 15-17(1999); Arizona v. Fulminante, supra at 309-310, this Court must find that the trial counsel had no possible strategic reason for failing to object (Tr. IX-34-35) to the procedure. Moreover, where as here, the closure order was issued,"...without even affording defense counsel an opportunity to be

heard" and "...the judge at no time explored the feasibility of options other than complete closure," Jones v. Henderson, 683 F.Supp. 917,923-924(E.D.N.Y. 1988), this Court must also find that an objection would have been futile and excuse the defendant from procedural bar created by counsel's omission. This is the appropriate course where the record does not show a knowing, intelligent and voluntary waiver by the defendant and because counsel cannot waive such a crucial Sixth Amendment right. Brookhart v. Janis, 384 U.S. 1,7(1966); Clemons v. Delo, 124 F.3d 944,956(8th Cir. 1997). This Court must create a bright line rule of automatic reversal for a sua sponte blanket courtroom closure to prevent the trial court doors in this Commonwealth from being closed at any critical stage of trial, whether that stage involves impanelment, presentation of evidence, argument or jury instructions.

Given the fact that a long line of Supreme Court, "...cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant", Gannett Co. v. DePasquale, 443 U.S. 368,380(1979), this Court must find that had counsel alerted the trial judge to the Waller, supra, requirements, that certainly would have accomplished something material for the defense" Commonwealth v. Street, 388 Mass. 282;288(1983),

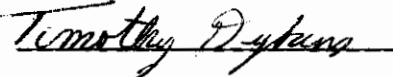
by either compelling the judge to continue to afford the defendant his fundamental right or to guarantee automatic reversal if the judge persisted with his closure order after being informed of the Waller requirements. Trial counsel's failure to object to the closing of the courtroom, "...likely deprived the defendant of an otherwise available, substantial ground of defense", Commonwealth v. Safarian, 366 Mass. 89,96 (1974). For, such prejudice, "...exists where[[a] court would have unanimously ordered a new trial if an exception had been saved". Commonwealth v. Alphas, 430 Mass. 8,13, 681 N.6 (1999), quoting Commonwealth v. Freeman, 352 Mass. 556 (1967). Trial counsel's silence arose from incompetence and ignorance of the law, rather than strategy", Washington v. Hofbauer, supra at 704, and consequently, this Court may presume incompetence from trial counsel's failure to call the trial judge's attention to Commonwealth v. Marshall, supra and Waller v. Georgia, supra, Commonwealth v. Rossi, 19 Mass.App.Ct. 257,259-261 (1985). Trial counsel rendered ineffective assistance under both state and federal standards.

The defendant's convictions must be reversed.

CONCLUSION

For the forgoing reasons, and the State's inability, or desire to follow precedent under equal protection of the law the defendant's convictions must be reversed.⁷

Respectfully submitted
Pro-se



Timothy Dykens
Po. Box 100
MCI Cedar Junction
S.Walpole Ma. 02071

Dated 2 January 2006

7

The lesser included kidnapping indictment must be dismissed prior to retrial on the attempted aggravated rape indictment if the Commonwealth elects to proceed to retrial on the greater offense

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Timothy Dykens,
Petitioner,

V.

Peter Allen
Respondent.

ON APPEAL FROM THE JUDGMENT OF THE STATE
COURT PURSUANT TO 28 U.S.C. § 2254.

PETITIONER'S MEMORANDUM

Dated 2 January 2005

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

AO 241 (Rev. 5/85)

United States District Court		District <u>Essex County</u>
Name <u>Timothy George Dykens</u>	Prisoner No. <u>w63485</u>	Case No. <u>150</u>
Place of Confinement <u>M.C.I. Cedar Junction</u>		
Name of Petitioner (include name under which convicted) <u>Timothy George Dykens</u>		Name of Respondent (authorized person having custody of petitioner) V. <u>Peter Allen Superintendant</u>
The Attorney General of the State of: <u>Massachusetts</u>		
<i>1st Amended</i> PETITION		
1. Name and location of court which entered the judgment of conviction under attack <u>Lawrence Superior Court, Lawrence Mass</u>		
2. Date of judgment of conviction <u>10-27-97</u>		
3. Length of sentence <u>Life without Parole</u>		
4. Nature of offense involved (all counts) <u>Murder in the First Degree, Attempted Aggravated Rape, and Kidnapping</u>		
5. What was your plea? (Check one)		
(a) Not guilty <input checked="" type="checkbox"/> (b) Guilty <input type="checkbox"/> (c) Nolo contendere <input type="checkbox"/>		
If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:		
6. If you pleaded not guilty, what kind of trial did you have? (Check one)		
(a) Jury <input checked="" type="checkbox"/> (b) Judge only <input type="checkbox"/>		
7. Did you testify at the trial? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		
8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		

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9. If you did appeal, answer the following:

(a) Name of court Supreme Judicial Court

(b) Result Affirmed

(c) Date of result and citation, if known 3-14-03

(d) Grounds raised Constitutional error on note taking, closing of courtroom during jury selection & instructions, Ineffective assistance of counsel.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court _____

(2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court _____

(2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court Essex County Superior Court

(2) Nature of proceeding Motion for new Trial

(3) Grounds raised Ineffective Assistance of Counsel

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(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result Affirmed

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

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For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (h) Denial of right of appeal.

A. Ground one: Constitutional error by Judge on note taking
during jury instructions

Supporting FACTS (state *briefly* without citing cases or law) The arbitrary and unequally
applied notetaking procedure differs materially from the standard
notetaking procedures governed by Superior Court Rule 8A.
Failure to give jury proper cautionary instructions, Allowance
of unrestricted notetaking during deliberations.

B. Ground two: Ineffective Assistance of counsel

Supporting FACTS (state *briefly* without citing cases or law) Trial counsel's failure to
object to a prejudicial jury instruction, and to request appropriate
guidelines, and or cautionary instructions. Failure to object
to the unbalanced and unrestricted instructions and failure
to request inspection and/or preservation of the jurors notes

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C. Ground three: INEFFECTIVE ASSISTANCE OF COUNSEL

Supporting FACTS (state *briefly* without citing cases or law) TRIAL COUNSELS FAILURE
TO PRESENT A FULL INTOXICATION DEFENSE, AND FAILURE TO CALL
DEFENDANT AND OTHER WITNESSES WAS EQUIVALENT AS A CONCESSION
OF GUILT

D. Ground four: INEFFECTIVE ASSISTANCE OF COUNSEL

Supporting FACTS (state *briefly* without citing cases or law) FAILURE TO MAKE A CLOSING
ARGUMENT ON TWO OF THE INDICTMENTS, AND CONCEDING THE DEFENDANTS
GUILT DURING CLOSING ARGUMENTS.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐

No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing ALBERT CONLON 73 N. COMMON, LYNN MA 01902

(b) At arraignment and plea ALBERT CONLON 73 N. COMMOM, LYNN MA 01092

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GROUND FIVE. INEFFECTIVE ASSISTANCE OF COUNSEL

Supporting FACTS (state *briefly* without citing cases or law) TRIAL COUNSEL WAS
INEFFECTIVE WHEN HE FAILED TO OBJECT WHEN INSTRUCTIONS
EVISцерATED DEFENDANTS OTHER PERSON THEORY IN INSTRUCTIONS
WHEN HIS WHOLE DEFENSE WAS BASED ON THE THEORY WITHOUT
WARNING.

GROUND SIX COSTITUTIONAL ERROR BY JUDGE BY CLOSING THE COURTROOM

Supporting FACTS (state *briefly* without citing cases or law) THE JUDGE ERRED WHEN HE
CLOSED THE COURTROOM DURING JURY INSTRUCTION, WITHOUT MAKING
ANY FINDINGS AS TO WHY., AND IMPROPERLY TRIED

Supporting FACTS (state *briefly* without citing cases or law) _____

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(c) At trial Albert Conlon 73 N. Common Lynn Ma. 01902

(d) At sentencing Albert Conlon 73 N. Common Lynn Ma..01902

(e) On appeal James A Couture 10 S.Main box 63 Belchertown Ma. 01007

Bernard Grossberg 99 Summer Street Boston Ma. 02110

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

September 1, 2005
(date)

Timothy J. O'Brien
Signature of Petitioner